

The issue is whether the Office met its burden of proof to rescind its acceptance of appellant's claim.

FACTUAL HISTORY

On November 15, 1999 appellant, then a 35-year-old air traffic controller, filed a claim for compensation for a traumatic injury sustained on November 14, 1999 at 9:00 p.m. Appellant described the injury as follows:

“A lightning strike occurred and simultaneously I felt a jolt and crackling in my right ear. It was continuous from my right ear, down my esophagus. It was painful. Within one hour the right side of my body had many symptoms. Some of which are headaches, dizziness, tingling in r[igh]t arm, chest pain r[igh]t side, etc.”

A witness, William Silaghi, stated:

“There was a flash of lightning overhead the control tower. The STVS [small tower voice system] radio panel blinked at the LC-W [local control -- west] position where [appellant] was working. She complained of receiving like an electrical jolt in her ear that traveled down her throat.”

On January 15, 2000 appellant stopped work and was examined by Dr. Richard Hindmarsh, a Board-certified family practitioner, who diagnosed electric shock based on appellant's history of receiving a jolt in her right ear through her headset simultaneous with a lightning strike on the night of November 14, 1999. In a November 19, 1999 report, Dr. Hindmarsh diagnosed vestibular nerve injury secondary to electrical current.

By letter dated December 13, 1999, the Office advised appellant that it had accepted her claim for effects of electric current, dizziness and giddiness. A treadmill stress test was authorized. Appellant received continuation of pay from November 15 to December 29, 1999 and compensation for temporary total disability from December 30, 1999 to January 15, 2000.

On January 4, 2000 the Office received additional information from the employing establishment. In a November 14, 1999 memorandum, Steven J. McKinty, the operations supervisor, stated that he listened to the tape for the evening of November 14, 1999 from 8:48 p.m. to 9:16 p.m. “for any indication that an electrical disturbance (suspected lightning) had caused static or other sounds on the radio frequencies as might be indicated on the recorded tape. I heard no indication on the tape, nor did I hear any change to the voice quality of the controller during that time period.” In a November 16, 1999 email addressed to Roman Miskewycz, the air traffic manager, Ben Maes, the supervisor of navigation communications, stated that his visual inspection of the STVS equipment racks, the position equipment at LC-W in the cab and the lightning protection system on the exterior of the tower shaft revealed no indication of damage from lightning or evidence of a lightning strike. Mr. Maes stated that it was not uncommon for a lightning storm in the area to affect the overall power grid resulting in flickering of some equipment, that all positions were working normally and that the grounding system for the whole structure, base building and tower was upgraded to protect from any damage from lightning. Mr. Maes concluded: “Due to the sensitivity of the electronics in the STVS, a lightning strike that was able to enter the equipment and be felt by the user would almost certainly damage the STVS.... Based on my findings, I do not believe lightning passed through

the STVS and reached the user.” In a November 17, 1999 email, Mr. Maes stated, “All of the external cabling and internal grounding provides a very low resistance path to ground for any lightning and will shunt the current away from the sensitive electronics and the user.” In a November 17, 1999 email, Gary Smith, an environmental and radar supervisor, stated that the lightning protection system was shunted to a large copper down conductor attached to copper ground rods all attached to a grid system at the base of the tower and was not connected to any of the electronic equipment and, that to have received any injury related to a lightning hit, the person would have to be electrically connected to the down conductors, which would result in that person being “fried.” Mr. Smith stated that there could have been some static noise created in the headsets and noted: “since we are unable to duplicate a 500,000,000 volt lightning hit on the tower, I will stand by our grounding system and say it is [in] working condition and could not have caused any major injury -- shock hazard -- to any employee.” In a January 25, 2000 telephone call, Mr. Miskewycz advised the Office that, about two months prior to her injury, appellant discussed reassignment for a stress condition due to medication for about one year and the employing establishment told her they could not reassign her.

In a December 7, 1999 report, Dr. Rajiv S. Pathak, a Board-certified neurologist, to whom Dr. Hindmarsh referred appellant, set forth the history of the November 14, 1999 injury and concluded that appellant was disabled by her multitude of symptoms, but that he was “not totally convinced this is due to lightning, although that does remain a possibility. Currently, the following are possibilities: (1) after effects of lightning with headache, dizziness, chest wall pain, etc; (2) another possibility would be that she is suffering from a viral syndrome and illness.” In a January 3, 2000 report, Dr. Pathak’s assessment was “Dizziness and headaches, most likely viral syndrome.” In a January 14, 2000 report, Dr. Hindmarsh diagnosed short-term memory loss, vertigo and right-sided headache status/post electrical shock and indicated these conditions were related to wearing a headset at the time of a lightning strike.

By decision dated February 2, 2000, the Office rescinded its acceptance of appellant’s claim on the basis that the evidence established that the injury did not occur in the manner alleged.

Appellant requested a hearing. By a May 17, 2000 decision, an Office hearing representative found that the Office failed to provide a pretermination notice and opportunity to submit additional evidence and that the February 2, 2000 decision did not constitute a final decision but rather a notice of proposed termination of compensation.

Appellant submitted additional evidence, including a June 9, 2000 report from Dr. David L. Stewart, Ph.D., a clinical psychologist, diagnosing post-traumatic stress disorder and a cognitive disorder directly and proximately caused by the electric shock delivered through her headset from the lightning strike on November 14, 1999. In a March 22, 2000 affidavit, George Swett testified that the STVS was connected to the telephone lines and there was no way to completely secure it from lightning and that the most likely source of the shock experienced by appellant was a lightning hit on a telephone or power line in the general vicinity of the Sacramento Airport Tower. In an April 24, 2000 evaluation of the employing establishment’s lightning protection, Warren K. Jordan stated that none of the antennas on the tower cab roof were properly bonded, that power panels at the subjunction level were not grounded and that his interview with appellant indicated that the means of conduction appeared to be through the

communications headset and that the injuries received were consistent with a lightning-related injury. In a June 12, 2000 affidavit, appellant testified that she advised the radar controller when the thunderstorm was about 7 to 10 miles northwest, that about that time she heard Mr. Silaghi, the other air traffic controller in the tower cab at the time of the November 14, 1999 incident, advise airport management that the incoming weather full of lightning was approaching the five-mile point. She then saw the flash of lightning and simultaneously received a jolt through her headset.

A July 31, 2000 memorandum signed by Mr. Miszkewycz and Mr. McKinty stated that “the facility feels that the fact of a lightning strike within a five-mile radius of the point of observation on the airport has never been established,” as the official weather observations did not indicate thunderstorms as part of the present weather, no physical evidence of a lightning strike was found at the tower and neither of the air traffic controllers reported the need for a special weather observation to the official weather observer as required. This memorandum further stated that electrical and telecommunications lines were underground and that Mr. McKinty listened to the recording from 12 minutes before the time claimed on appellant’s claim form to the time she was relieved by another controller and heard no change in appellant’s voice quality.

By decision dated September 5, 2000, the Office found that the evidence failed to establish that the claimed traumatic injury on November 14, 1999 occurred at the time, place and in the manner alleged. The Office terminated appellant’s entitlement to medical benefits.

Appellant requested a hearing and submitted a February 15, 2001 report from Dr. Pathak, stating that the cause of her conditions was undetermined but that it was not a viral syndrome as it had gone on for more than one year. At a hearing held on March 13, 2001 Mr. Silaghi testified that he recalled notifying the airport on the night of November 14, 1999 that there was lightning within five miles of the airport or something to that effect. His call to the weather observers to notify them of lightning was not on a recorded line; he did not see the actual lightning bolt but noticed a flash of lightning overhead the tower or in the general vicinity. Almost instantaneously the lights intensified then diminished where appellant was working and shortly thereafter appellant said she felt a tingling down her throat and spine.

By decision dated June 12, 2001, an Office hearing representative found that the Office met its burden of proof to rescind acceptance of appellant’s claim, as it properly found that the November 14, 1999 incident did not occur as alleged.

Appellant requested reconsideration and submitted additional evidence. A March 27, 2001 electroencephalogram (EEG) was abnormal with epileptiform waves, an August 14, 2001 EEG was normal and an October 29 to November 2, 2001 video EEG telemetry study was not diagnostic of epilepsy. In a June 6, 2002 report, Dr. Mary Ann Cooper, Board-certified in emergency medicine, stated that she had reviewed the transcript of the March 2001 hearing, Mr. Jordan’s report and the medical reports of Drs. Stewart and Pathak. Dr. Cooper stated that personnel lightning safety was very different from structural lightning safety and that appellant’s statements were consistent with complaints normally given by someone injured by lightning. She noted that it was more usual than not for a person sustaining a lightning injury to attempt to return to work and that it was not unusual for someone who had a lightning injury to delay

seeking medical care for hours to days, as many had what seemed to be an organic nonrecognition of the injury or assumed they should feel sore and confused for a time after the injury. Dr. Cooper concluded, "I have no medical doubt that lightning is the direct and proximate cause of [appellant's] complaints and deficits." Submitted with Dr. Cooper's report was her curriculum vitae, which showed that since 1994 she was Director of the Lightning and Electrical Injury Research Program at the University of Illinois at Chicago and had written numerous articles on lightning injuries.

By decision dated September 23, 2002, the Office found that the additional evidence was immaterial and insufficient to warrant review of its prior decisions. Appellant appealed to the Board which, by decision dated June 23, 2003, found that the report from Dr. Cooper was relevant new evidence requiring a review of the merits of appellant's case.¹

By letter dated November 6, 2003, appellant submitted additional evidence, including weather maps showing thunderstorm activity in the area of the employing establishment on November 14, 1999 at 8:50 p.m. and transcripts of depositions taken in her civil suit against Raytheon, Inc., the company that installed the lightning protection system at the employing establishment in 1996. In a December 16, 2002 deposition, Mr. Jordan testified regarding his experience in investigating lightning and its effects and in developing lightning protection systems for the Air Force, Navy and the National Weather Service. He had worked as an investigator of lightning phenomena for the Federal Aviation Administration (FAA) since 1995, presently as chairperson of its grounding and surge protection work group and on the task group rewriting the lightning safety code for electronic facilities. Mr. Jordan testified that his inspection of the tower cab at the employing establishment revealed that it was not equipotentially bonded and that there was no grounding wire in the distribution panels that fed the equipment to the tower cab. The problems with the tower would allow current flow between the difference of potential points within the structure and that if power flow went through an individual, it could cause an injury. He stated that there were multiple instances where conduction to appellant's headset could happen. Mr. Jordan also testified that it was possible for an individual to sustain an injury from lightning without damage to equipment and that he had been involved in several such incidents over the years. His April 24, 2000 trip to the employing establishment was made because of a possible injury to appellant and to see if the facility complied with FAA standards. The injuries appellant described to him were consistent with a physiological injury from lightning and that the perception of people that work with lightning had changed in the past year to include broader than a five-mile scope of influence from thunderstorms.

In an April 25, 2003 deposition, Mr. Smith testified that he had taken one two-week FAA class on lightning protection and that he did not know if a person could be injured without damage to equipment. He indicated that his November 1999 memorandum suggesting this could not occur was his personal view. In an April 25, 2003 deposition, Mr. McKinty testified that he would expect a controller to tell weather observers of a lightning strike, that lightning within five miles would definitely require notification and a special weather observation and that he did not hear a crackling sound on the recording from November 14, 1999. In an April 25, 2003

¹ Docket No. 03-576 (issued June 23, 2003).

deposition, Mr. Maes testified that he attended a one-week FAA seminar on lightning and that he was not a lightning expert. He testified that there were green grounding wires on each chassis of the tower consoles, that he found no damage on physical inspection and the equipment was operational. Due to the sensitivity of the devices, he would have expected some equipment damage with a lightning strike and his conclusion that it was unlikely for an injury to occur without equipment damage was based on his electronics experience. In a telephone conference on October 15, 2003, Robert Niznik, the air traffic controller who relieved appellant on November 14, 1999, stated that on that night there was one very close lightning strike with the thunderclap coming maybe a second later, but he was unable to state how long this occurred before he relieved appellant.

By decision dated December 8, 2003, the Office found that factual and medical evidence submitted did not establish a work-related incident occurring on November 14, 1999.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim.² The Office's regulation on rescission states: "If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied."³ The Board has held that the power to annul award of compensation is not an arbitrary one and only be set aside in the manner provided by the compensation statute.⁴

An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by the preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that the employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁵ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and the failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.⁶ An employee's statement alleging that an injury

² *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

³ 20 C.F.R. § 10.610.

⁴ *Linda L. Newbrough*, 52 ECAB 323 (2001).

⁵ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

⁶ *Dorothy Kelsey*, 32 ECAB 998 (1981).

occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁷

ANALYSIS

On December 13, 1999 the Office accepted appellant's claim for a traumatic injury on November 14, 1999 for effects of electric current, dizziness and giddiness. By decision dated February 2, 2000, the Office rescinded its acceptance of appellant's claim on the basis that the evidence established that the injury did not occur in the manner alleged. In a February 2, 2000 decision and a June 12, 2001 decision by an Office hearing representative, the Office found that the November 14, 1999 injury did not occur as alleged by appellant. The Office's September 5, 2000 and December 8, 2003 decisions misplaced the burden of proof in this rescission case by finding that the evidence did not establish a work-related incident on November 14, 1999 as alleged by appellant. To meet its burden of proof to rescind, the Office must establish that the November 14, 1999 incident did not occur as alleged.

The Board finds that the Office did not meet its burden of proof to establish that the November 14, 1999 incident did not occur as alleged. Appellant's statement that the November 14, 1999 injury occurred when she felt a jolt in her right ear simultaneous with a lightning strike is entitled to great probative value and is not refuted by the probative evidence of record. Her statement was consistent with the surrounding facts and circumstances: appellant filed a claim the following day, an eyewitness confirmed that she complained of an injury immediately after a flash of lightning overhead, she worked for only a short time on the date of the incident and has not worked since and obtained medical treatment the day after the alleged incident.

The evidence relied upon by the Office in rescinding acceptance of appellant's claim consisted of statements by Mr. McKinty that no static or change in appellant's voice was heard on the tape for November 14, 1999. It also noted that Mr. Maes explained that he would have expected equipment damage if lightning had passed through the equipment and injured appellant. Mr. Smith stated that the grounding system was in working condition and could not have caused an injury to any employee. The Office also noted Dr. Pathak's statement that appellant's condition, when seen in December 1999 and January 2000, was likely due to a viral syndrome.

None of the evidence relied upon by the Office is sufficient to establish that appellant did not experience the lightning incident on November 14, 1999 as alleged. Mr. Maes acknowledged in an April 25, 2003 deposition that he was not a lightning expert. He explained that he found no damage to the grounding wires on inspection. The employing establishment's actual lightning expert, Mr. Jordan, refuted Mr. Maes' statement by testifying in a December 16, 2002 deposition that it was possible for an individual to sustain an injury from lightning without damage to equipment and that he had been involved in several such incidents over the years. The testimony of Mr. Jordan that there were defects in the employing establishment's lightning protection system refutes Mr. Smith's conclusion that the equipment was in working order and could not have caused an injury to any employee. Mr. Smith acknowledged in an April 25, 2003

⁷ *Caroline Thomas*, 51 ECAB 451 (2000).

deposition that his lightning training consisted of a two-week course and that he did not know if a person could be injured without damage to equipment. In a February 15, 2001 report, Dr. Pathak noted that the cause of appellant's condition was not a viral syndrome, as posited in his December 1999 and January 2000 reports, the condition had gone on for more than one year. The Board notes that the absence of static or a change in appellant's voice on the recording made on November 14, 1999 does not establish that the incident did not occur as alleged. Mr. Niznik, the air traffic controller who relieved appellant that evening, noted there had been a very close lightning strike, a fact also noted by Mr. Silaghi, the other controller working with appellant.

The evidence the Office obtained after its February 2, 2000 rescission also does not establish that appellant did not experience an electric shock on November 14, 1999. The employing establishment's statements that lightning was not shown within five miles was contradicted by the weather maps submitted by appellant and by the statements of appellant and the other air traffic controllers that there was lightning within a five-mile radius. The importance of whether the lightning was within or outside of five miles was cast into doubt by Mr. Jordan's testimony that the influence of thunderstorms was greater than five miles. Mr. Silaghi, who was in the tower cab with appellant at the time of the claimed injury, stated that he saw a lightning flash just before appellant complained of a jolt in her ear. This is consistent with her account of the injury and the statement of Mr. Niznik, the air traffic controller who relieved appellant, that there was a very close lightning strike. The Board finds that the record does not contain substantial and probative positive evidence confirming that the November 14, 1999 injury did not occur as alleged.

CONCLUSION

The Board finds that the evidence is not sufficient to meet the Office's burden of proof to establish that the November 14, 1999 incident did not occur as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2003 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded to the Office for a determination of the medical conditions related to the November 14, 1999 injury.

Issued: April 26, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member